

**Policy Department C
Citizens' Rights and Constitutional Affairs**



**PROGRESS MADE AND EXISTING GAPS IN THE FIELD
OF JUDICIAL CO-OPERATION IN CRIMINAL MATTERS**

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**Directorate-General Internal Policies
Policy Department C
Citizens Rights and Constitutional Affairs**

PROGRESS MADE AND EXISTING GAPS IN THE FIELD OF JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

BRIEFING PAPER

ABSTRACT

The briefing note provides an overview of the progress made and existing gaps in the field of judicial co-operation in criminal matters.

It first reviews perceived difficulties with the pillar structure and examines the amendments that the Reform Treaty - due to be formally adopted at the European Council in December 2007 - would introduce. The different approaches to co-operation at a European level, i.e. mutual legal assistance, mutual recognition and approximation are also analysed.

A particular emphasis is placed on current legislative proposals and other developments, such as the current state of play of the European Arrest Warrant, Eurojust and the European Judicial Network in criminal matters.

Finally, the EU external relations in the field of judicial co-operation in criminal matters are also briefly mentioned.

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BRIEFING NOTE

PROGRESS MADE AND EXISTING GAPS IN THE FIELD OF JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

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1. INTRODUCTION

Judicial co-operation in criminal matters is currently subject to the Third Pillar of the European Union under Title VI TEU (Articles 29-42 EU) and is considered an essential condition for the development of the EU as an area of freedom, security and justice. Co-operation in this policy area was introduced by the provisions on Justice and Home Affairs of the Treaty on European Union (the Maastricht Treaty) and further developed through the Treaties of Amsterdam and Nice.

The Third Pillar of the EU, currently also dealing with police co-operation issues, was partially communitarised by the Treaty of Amsterdam. The policies on visas, borders, asylum, migration, and judicial co-operation in civil matters have been subject to the first pillar under Title IV TEC (Articles 61-69 EC) since 1 May 1999.

The development of judicial co-operation in criminal matters is a fundamental objective of the EU. According to Article 29 TEU it shall be achieved by preventing and combating crime, organised or otherwise, through closer co-operation between police forces, judicial and other competent authorities of the Member States, and approximation, where necessary, of rules on criminal matters in the Member States.

Both the Tampere Conclusions² that set out a very ambitious programme which came to an end in 2004³, and the Hague Programme⁴ for the years 2005-10 further elaborate on concrete measures to be implemented for the progressive establishment of a European area of justice. Both programmes have endorsed the principle of mutual recognition of judicial decisions, considered to be the cornerstone of judicial co-operation in civil and criminal matters⁵.

In this context, the briefing note provides an overview of the progress made and existing gaps in the field of judicial co-operation in criminal matters, focusing on perceived difficulties with

¹ The author would like to thank Samantha SEEWOSURRUN for her comments and the linguistic revision of the text.

² Adopted at the Tampere European Council which took place on 15 and 16 October 1999.

³ The Commission submitted a Communication to the Council and the European Parliament on the assessment of the Tampere programme when it came to an end. Future priorities were also outlined. COM(2004) 401 final, 2.6.2004.

⁴ See OJ C 53 of 3 March 2005.

⁵ This principle was introduced in Articles III-269 and III-270 of the Treaty establishing a Constitution for Europe. It has also been introduced in Articles 69d and 69e of the Reform Treaty.

the pillar structure and the amendments that the Draft Reform Treaty would introduce, the different approaches to judicial co-operation, current legislative proposals, and other developments, such as the current state of play of the European Arrest Warrant, Eurojust and the European Judicial Network in criminal matters. Finally, the EU external relations in the field of judicial co-operation in criminal matters are also briefly mentioned.

2. DIFFICULTIES ARISING FROM THE LEGAL AND INSTITUTIONAL SYSTEM ESTABLISHED BY THE THIRD PILLAR AND AMENDMENTS SET OUT BY THE DRAFT REFORM TREATY

Decision-making in the field of judicial co-operation in criminal matters has been traditionally subject to the ‘inter-governmental’ method requiring unanimity of Member States in the Council of Ministers. Currently, proposals can be submitted either by Member States or the European Commission. The Council, before deciding by unanimity, is obliged to consult the European Parliament, but is not bound by its opinion. The European Court of Justice has limited jurisdiction (Article 35 TEU) and the Commission cannot initiate infringement procedures against Member States.

2.1. Difficulties with the Third Pillar

The European Commission has identified a number of *recurrent difficulties* associated to the current legal and institutional system established by the Third Pillar⁶ (Title VI TEU). It has been argued that those difficulties are preventing the Union from further developing judicial co-operation in criminal matters in an effective and efficient manner⁷. They can be summarised as follows:

- **Lack of direct effect of framework decisions and decisions.** Individuals cannot invoke EU legislation adopted in the framework of Title VI TEU before a national court⁸.
- **Insufficient powers of the European Parliament in the legislative process.** The EP is only afforded a consultative role and is therefore unable to fulfil its democratic role.
- **National parliamentary reservations.** Some Member States can only accept a legal instrument after having received the approval of their national Parliaments. This practice only delays its formal adoption and does not really contribute to its democratic legitimacy.
- **The unanimity requirement.** In a European Union of 27 Member States, apart from delaying the adoption of a legal instrument, it often leads to agreements based on the lowest common denominator or to a deadlock.

⁶ See COM(2006) 331 final, 28.6.2006, pp. 12-15.

⁷ See the Commission Report on the implementation of The Hague programme for 2006, COM(2007) 373 final, 3.7.2007, pp. 12-13 & 18-19.

⁸ However, the European Court of Justice has confirmed that the principle of indirect effect also applies in the area of police and judicial co-operation in criminal matters: judgement of 16 June 2005 in Case C-105/03, Maria Pupino. Consequently, the national judge must interpret its national law in conformity with Third Pillar legislation.

- **Shared right of initiative of the Commission with each of the 27 Member States.** It does not favour a true European dimension, nor the accountability of the Member States' legislative initiatives.
- **Limited jurisdictional control.** The European Court of Justice only has jurisdiction to give preliminary rulings⁹, review the legality of framework decisions and decisions and rule on any dispute amongst Member States or between Member States and the Commission under the conditions established by Article 35 EU¹⁰.
- **Uncertain transposition and implementation.** Infringement procedures are excluded from the jurisdiction of the Court in the Third Pillar. Consequently, the Commission cannot ensure proper transposition and implementation.
- **The pillar structure of the Union.** It leads to the fragmentation of a legal instrument in those cases where the Community has criminal law competence¹¹. As a result, certain legislative initiatives need to be split up into two different legal instruments: one dealing with the definition of criminal offences and imposition of criminal penalties concerning a given Community policy (first pillar) and the other focusing on other aspects, such as the type and level of the criminal penalties, that must be treated in the framework of judicial co-operation in criminal matters (Third Pillar).

Apart from the Commission, the European Parliament has also stressed on a number of occasions the urgent need to communitarise police and judicial co-operation in criminal matters¹². The governments of the Member States agreed to abolish the EU pillar structure in the framework of the Treaty establishing a Constitution for Europe and, more recently, in the framework of its successor, the Reform Treaty.

2.2. The amendments set out by the Draft Reform Treaty and their implications

The Reform Treaty - due to be formally adopted at the European Council in December 2007 - would transfer police and judicial co-operation in criminal matters into Title IV TEC (first pillar), merging with the current provisions on visas, borders, asylum, migration, and judicial co-operation in civil matters. Consequently, it would create a single and simplified legal and institutional framework, although a number of exceptions would remain, and would improve

⁹ The judgment of 27 February 2007 in Case C-354/04 P and 355/04 P, *Gestoras Pro-Aministía & Segi*, enables national courts to refer questions for a preliminary ruling to the ECJ on a common position that produces legal effects in relation to third parties.

¹⁰ At present, there is a debate ongoing on the establishment of an emergency preliminary ruling procedure at the European Court of Justice concerning the area of freedom, security and justice. The amendment proposed to the Council by the President of the ECJ, Mr Vassilios SKOURIS, would allow derogations from certain provisions of the Statute of the ECJ. The Council could accept an acceleration of preliminary ruling proceedings on the basis of the second option proposed by the Court. See Council document 7646/07. On the basis of that option, the Court has proposed amendments to the rules of procedure of the Court of Justice. See Council document 11759/1/07 of 16 July 2007.

¹¹ The European Court of Justice has established that the EC has criminal law competence to require the Member States to lay down criminal penalties for the purpose of protecting the environment and combating ship-source pollution in order to ensure the effective implementation of their corresponding Community policies. However, the determination of the type and level of the criminal penalties does not fall within the Community's sphere of competence. See Judgment of 13 September 2005 in Case C-176/03 and Judgment of 23 October 2007 in Case C-440/05. See also COM(2005) 583 final, 23.11.2005.

¹² See, for example, the EP resolution on the implications of the Court's judgment of 13 September 2005, P6_TA(2006)0260.

democratic legitimacy. The amendments set out by the Reform Treaty¹³ and their implications can be summarised as follows:

- **Lack of direct effect of Third Pillar measures adopted before the entry into force of the Reform Treaty.** According to Article 9 of Protocol 10 to the Reform Treaty, that deals with transitional provisions, *“the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union”*.

Only first pillar measures adopted in the framework of Title IV TFEU¹⁴ after the entry into force of the Reform Treaty would have direct effect.

- **A shift to co-decision, although some exceptions would remain; more powers for the European Parliament in the legislative process.**
 - o An ‘emergency break’ would apply under Article 69e (2) TFEU (approximation of procedural criminal law) and Article 69f (1) (2) TFEU (approximation of substantive criminal law) where a member of the Council would consider that a draft directive as referred to in the mentioned paragraphs would affect fundamental aspects of its criminal justice system.
 - o In that case, it might request that the draft directive would be referred to the European Council and the ordinary legislative procedure (co-decision) would be suspended.
 - o After discussion, and in case of a consensus, the European Council, within four months of this suspension, would refer the draft back to the Council, which would terminate the suspension of the co-decision procedure.
 - o In case of disagreement, and within the same timeframe, it is provided that at least nine Member States could establish an enhanced co-operation on the basis of the draft directive concerned (Articles 69e (3) and 69f (3)).

Otherwise **co-decision** (and qualified majority vote) would apply for Articles 69e, 69f and 69g (extension of the powers of Eurojust).

The Council (deciding by unanimity) would need to obtain the **consent of the European Parliament** for the extension of the EU competence to other specific aspects of criminal procedure (Article 69e, (2) (d)), to other areas of crime (Article 69f (1) third subparagraph), and for establishing a European Public Prosecutor’s Office from Eurojust (Article 69i (1)).

- **Strengthening of the role of national Parliaments in the European area of freedom, security and justice.** According to Article 8c TUE national Parliaments, apart from contributing actively to the good functioning of the Union by ensuring that the

¹³ The implications for certain aspects of police co-operation are not covered by the briefing note.

¹⁴ The Reform Treaty renames the EC Treaty (TEC) as the Treaty on the Functioning of the European Union (TFEU). The Treaty on European Union (TEU) is not renamed.

principle of subsidiarity would be respected¹⁵ (see also Article 63 TFEU), within the particular framework of the area of freedom, security and justice, national Parliaments would also contribute actively by taking part in the evaluation mechanisms for the implementation of the Union policies in that area, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities.

- **Partial shift to qualified majority vote.** Unanimity would remain a requirement for the extension of the EU competence to specific aspects of criminal procedure (Article 69e, (2) (d)), to other areas of crime (Article 69f (1) third subparagraph), and for establishing a European Public Prosecutor's Office from Eurojust (Article 69i (1)).
- **Shared right of initiative of the Commission with at least a quarter of the Member States.** According to Article 68 TFEU, the acts covered by the provisions on police and judicial co-operation in criminal matters would be adopted either on a proposal from the Commission, or on the initiative of a quarter of the Member States (at least seven).
- **Normal jurisdictional control subject to a transitional period of five years for Third Pillar measures adopted before the entry into force of the Reform Treaty and possible opt-outs for the UK, Ireland and Denmark.** From the date of entry into force of the Reform Treaty, the ECJ would exercise its normal jurisdictional control only over those legal acts in the field of judicial co-operation in criminal matters adopted after the mentioned date and over pre-existing legal acts amended after that date.

However, according to Article 10 of Protocol 10 to the Reform Treaty, that deals with transitional provisions, the current limited jurisdictional control would still apply during a five-year period after the entry into force of the Reform Treaty with respect to Third Pillar legal acts adopted before the entry into force of the new Treaty.

- **Extension of the UK, Irish and Danish opt-outs to the entire new Title IV TFEU.** According to the Protocols to the Reform Treaty on the position of the UK, Ireland and Denmark as regards the area of freedom, security and justice, the UK and Ireland would have the possibility to opt in to legal acts on a case by case basis. Although Denmark does not have the same possibility, it could be given the choice to do so in the future.

Denmark would therefore avoid the Court's jurisdiction over the entire new Title IV TFEU. UK and Ireland could do so as well by not opting in to a particular legal act¹⁶.

¹⁵ See Protocol 1 to the Reform Treaty on the role of national Parliaments in the EU and Protocol 2 on the application of the principles of subsidiarity and proportionality. The latter sets out in Article 8 that the ECJ shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 230 TFEU by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

¹⁶ The UK could also refuse to accept the Court's normal jurisdiction after the transitional period of five years. In that case, all Third Pillar legislation adopted before the Reform Treaty, and not amended afterwards, would cease to apply to the UK. Steve PEERS covers in detail the "British and Irish opt-outs from EU Justice and Home Affairs law" in *Statewatch Analysis. EU Reform Treaty Analysis n° 4*, version 2: 26 October 2007. See also "Analysis of the amended text of the draft Reform Treaty" in *Statewatch Analysis 5, EU Reform Treaty*, 12 October 2007. www.statewatch.org

- **Uncertain transposition and implementation during a period of five years for Third Pillar measures adopted before the entry into force of the Reform Treaty.** The Court's jurisdiction over infringement actions would also be inapplicable for five years. The Commission could only ensure proper transposition and implementation over the legal acts adopted after the entry into force of the Reform Treaty and over pre-existing legal acts amended after that date.
- **The need to split up a legislative initiative into two different legal instruments would disappear with the abolition of the Third Pillar.** Possible intra-Community disputes would also be avoided as the Reform Treaty introduces in Article 69f (2) an EU competence to approximate the criminal law of the Member States where it would prove essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

3. CURRENT LEGISLATIVE PROPOSALS IN THE FIELD OF JUDICIAL CO-OPERATION IN CRIMINAL MATTERS AND OTHER DEVELOPMENTS

3.1. Approaches to EU co-operation: from mutual legal assistance to mutual recognition and approximation

Prior to the Tampere Conclusions, judicial co-operation in criminal matters at a European Union level was fundamentally based on the principle of mutual legal assistance. The Conventions adopted during this period, such as the one on simplified extradition procedure of 10 March 1995 or the one concerning extradition of 27 September 1996, followed basically the same scheme as the Council of Europe's Conventions, i.e. fundamentally based on the principle of territorial sovereignty, far from granting co-operation automatically and functioning at a slow pace.

The most important and recent EU instrument in this field is the Convention on Mutual Assistance in Criminal Matters between the Member States, adopted on 29 May 2000¹⁷.

From the entry into force of the Treaty of Amsterdam and the adoption of the Tampere Conclusions, mutual recognition¹⁸ of judicial decisions in criminal matters has emerged as the cornerstone of judicial co-operation. It provides that the courts of a Member State will recognise and execute judgments of a court in another Member State, with the minimum of formality and on the basis of mutual trust¹⁹. The abolition, for example, of the administrative or governmental control in extradition -or surrender- requests or the establishment of the principle of direct contact between judicial authorities have greatly contributed to speeding up national judicial proceedings.

The Hague Programme further elaborates on the realisation of mutual recognition and reaffirms that the comprehensive programme of measures to implement it, which encompasses

¹⁷ It appears that up to now 22 Member States have ratified or acceded to it and that for most of them it has entered into force in 2005. The Member States that have not ratified the Convention yet are Greece, Italy, Luxembourg, Ireland and Malta. See Council document n° 8257/07 LIMITE CATS 29 COPEN 43, of 3 April 2007. The Convention was supplemented by a Protocol of 16 October 2001.

¹⁸ After the Tampere Conclusions, it was further implemented by the "Programme of measures to implement the principle of mutual recognition of decisions in criminal matters". See OJ C 12 of 15.1.2001.

¹⁹ See the Communication from the Commission on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States. COM(2005) 195 final, 19.5.2005.

judicial decisions in all phases of criminal procedures, should be completed and the development of equivalent standards for procedural rights in criminal proceedings guaranteed. The approximation of minimum rules concerning aspects of procedural and substantive criminal law is also envisaged in order to facilitate mutual recognition.

Both approximation and mutual recognition are notions that complement and need each other. There cannot be effective implementation of mutual recognition without mutual trust between Member States, and there cannot be mutual trust without a certain level of approximation of their laws.

According to a number of European policy-makers, mutual recognition, however, may already be reaching its limits as a fundamental principle of co-operation. The forthcoming agenda for Justice and Home Affairs could include more approximation between the criminal laws of the Member States in order to ensure future progress and the further realisation of the European criminal law area.²⁰

3.2. Current legislative proposals in the field of judicial co-operation in criminal matters

This section presents a synthesis of the state of play of current legislative proposals.

Substantive Criminal Law

3.2.1. Combating racism and xenophobia

The aim of the draft Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law²¹ is to approximate criminal law provisions and to combat racist and xenophobic offences more effectively by promoting full and effective judicial co-operation between Member States.

The JHA Council reached on 19 April 2007²² a general approach on the text of the proposal. Once adopted, the FD would deal with crimes such as incitement to hatred and violence and publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes. It would be limited to crimes committed on grounds of race, colour, religion, descent and national or ethnic origin²³.

The European Parliament gave its opinion on the initial draft proposal on 4 July 2002²⁴ and has been re-consulted due to the modifications made in the text and the title of the proposed FD in follow-up to their examination by the bodies of the Council since its submission by the Commission in 2001²⁵.

It should be noted that the draft FD is subject to parliamentary scrutiny reservations by Ireland, The Netherlands, Sweden, Denmark and Latvia.

²⁰ The report of the House of Commons on "Justice and Home Affairs Issues at European Union Level" mentions this possibility. HC 76-I, published on 5 June 2007, recital 66.

²¹ The original proposal was submitted by the Commission on 28.11.2001. COM(2001) 664 final.

²² Council doc. 8364/07, pp. 23-25.

²³ See the statements to be inserted in the minutes of the Council at the time of adopting the FD. Council doc. 11523/1/07 REV 1 of 20 July 2007.

²⁴ P5_TA(2002)0363.

²⁵ On 5 March 2007, the EP issued a draft report containing a proposal for an EP recommendation to the Council concerning the progress of the negotiations on the FD: PE 386.339v01-00.

3.2.2. Protection of the environment through criminal law

The European Commission submitted a proposal for a Directive on the protection of the environment through criminal law on 9 February 2007²⁶ that replaces the proposal for a Directive on the same subject of 13 March 2001²⁷ as amended after the first reading of the European Parliament²⁸.

The purpose of this new Directive is to implement the findings of the European Court of Justice in its judgment of 13 September 2005 (C-176/03, Commission v. Council) which annulled the Framework Decision 2003/80/JHA on the protection of the environment through criminal law²⁹.

The ECJ considered that although, “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence, that does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures that relate to the criminal law of the Member States which it considers necessary in order to ensure that the rule which it lays down on environmental protection are fully effective”.³⁰ On this basis, the Court ruled that the FD encroached on Community competence, and did not respect Article 47 EU.

The draft Directive is being discussed by the Working Party on Substantive Criminal Law, although it decided that the discussion on the rules on sanctions (Articles 5 and 7) should be postponed until the ECJ has ruled on the Commission’s action for annulment of the Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution³¹.

On 23 October 2007 **the European Court of Justice** found that the European Community is also competent to oblige the Member States to provide for common criminal penalties in order to combat ship-source pollution³² and decided to annul the mentioned FD. It **has also clarified that the determination of the type and level of criminal penalties to be applied does not fall within the Community’s sphere of competence**³³.

It follows that Articles 5 and 7 will need to be reconsidered and an instrument of the Third Pillar will be required to complement the Directive where the Community has no competence to legislate. The European Parliament is fully involved in negotiations on the draft Directive as the co-decision procedure applies.

²⁶ See COM(2007) 51 final, SEC (2007) 160 and SEC(2007) 161 all of them of 9.2.2007.

²⁷ See COM(2001) 139 final of 13.3.2001.

²⁸ See COM(2001) 544 final of 30.09.2002 and EP document P5_TA(2002)0147.

²⁹ OJ L 29/55 of 5.2.2003.

³⁰ Judgment of the Court of 13 September 2005, Case C-176/03, recitals 47-48. The Commission submitted a Communication on the implications of the Court’s judgment on 24.11.2005. See COM(2005) 583 final/2.

³¹ OJ L 255/164 of 30.09.2005.

³² Judgment of the Court of 13 October 2007, Case C-440/05.

³³ Case C-440/05, Recital 70.

The judgment mentioned above will also allow the Council to make progress on the **draft Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights**³⁴.

Procedural Criminal Law

3.2.3. Procedural rights in criminal proceedings throughout the European Union

Despite the efforts of the German Presidency, at the Justice and Home Affairs Council meeting that took place in Luxembourg on 12-13 June 2007, it was concluded that the Council was not able to reach a consensus on the Framework Decision on certain procedural rights in criminal proceedings throughout the European Union³⁵.

It should be noted that, considering that procedural rights in criminal proceedings are a crucial element for ensuring mutual confidence among the Member States in judicial co-operation, the European Parliament supported the draft Framework Decision at first reading on 12 April 2005³⁶.

The Framework Decision would have established rules defining certain rights of persons arrested in connection with or charged with a criminal offence in order to safeguard the fairness of criminal proceedings throughout the European Union. In particular, at its meeting on 1-2 June 2006, the JHA Council concluded that the scope of the proposed FD would be limited to the right to information, the right to legal assistance, the right to legal assistance free of charge, the right to interpretation and the right to translation of documents of the procedure.

A step forward in this area has been the adoption by the Commission of the **Green Paper on the presumption of innocence**³⁷ on 26 April 2006. The contributions made, have been published in the Commission's website³⁸. However, the **Green Paper on default (in absentia) judgments** that was due in 2006, has been delayed³⁹.

3.2.4. Conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings

The European Commission submitted a Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings on 23 December 2005⁴⁰ with the intention of opening a debate on the **need to create a mechanism for the allocation of criminal cases to the most appropriate jurisdiction in order to avoid multiple prosecutions**.

At present, EU criminal justice is confronted with a number of situations where multiple prosecutions -on the same cases- can be held in different Member States. The only legal bar-

³⁴ See COM(2006) 168 final of 26.4.2006. On 25 April 2007 the European Parliament adopted the amended-Commission proposal, subject to a large number of amendments. See EP document P6_TA-PROV (2007)0145.

³⁵ The Commission proposal was adopted on 28.4.2004. See COM(2004) 328 final.

³⁶ See EP document P6_TA(2005)0091.

³⁷ COM(2006) 174 final.

³⁸ http://ec.europa.eu/justice_home/news/consulting_public/presumption_of_innocence/news_contributions_presumption_of_innocence_en.htm

³⁹ See SEC(2007) 896 of 3.7.2007, p. 37.

⁴⁰ COM(2005) 696 final.

rier to these undesirable situations is the principle of *ne bis in idem*, currently laid down in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA)⁴¹.

However, as the Commission explains in the Green Paper, the principle of *ne bis in idem* does not prevent conflicts of jurisdiction while multiple prosecutions are ongoing in two or more Member States; it can only come into play, by preventing a second prosecution on the same case, if a decision which bars a further prosecution (*res judicata*) has terminated the proceedings in a Member State⁴².

The Commission has published the contributions submitted in response to the Green Paper⁴³ and a proposal on conflicts of jurisdiction is currently under consideration. In this respect, a final decision will be taken after further consultation with the Member States⁴⁴.

3.2.5. Personal data protection in the field of judicial co-operation in criminal matters

The purpose of the Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters⁴⁵, according to Article 1 of the draft FD⁴⁶, is to ensure a high level of protection of the basic rights and freedoms, and in particular the privacy, of individuals with regard to the processing of personal data in the framework of police and judicial co-operation in criminal matters, provided for by Title VI EU, while guaranteeing a high level of public safety.

The draft FD was discussed at the Council meeting of 18 September 2007⁴⁷, in the framework of which an agreement was reached on the scope of the FD –it will only apply to the cross-border exchange of personal data- and as regards the principles relating to the transmission of personal data to third States –data transmitted to another Member State may be transferred to third States or international bodies only if a number of conditions, including prior

⁴¹ The European Court of Justice has interpreted Article 54 of the Schengen Convention in the judgments C-187/01, C-385/01, C-469/03, C-493/03, C-436/04, C-467/04, C-150/05, C-288/05 and C-367/05.

⁴² See, in this respect, the judgment of the Spanish “Audiencia Nacional, Sala de lo Penal, Sección Segunda” on the terrorist attack perpetrated in Madrid on 11 March 2004. Judgment n° 65/2007, delivered on 31 October 2007, Rapporteur: Javier GÓMEZ BERMÚDEZ. Rabei Osman EL SAYED AHMED, also known as “Mohamed the Egyptian” has also been prosecuted in Spain for the same offence for which he had already been convicted in Italy. However, the Spanish *Audiencia Nacional* has applied the principle of *ne bis in idem* to EL SAYED AHMED in order to avoid him being sentenced again for **participation in a terrorist organisation**. For the same offence he had already been convicted by a court in Milan on 6 November 2006 (where he is currently imprisoned serving this conviction). Although the Italian judgment is not final, the Spanish court has considered that the application of the *ne bis in idem* principle does not require it according to Spanish and international legislation (Article 54 of the Schengen Convention has not been considered explicitly in the judgment), with the consequence that EL SAYED AHMED has been acquitted in Spain. The Public Prosecutor does not agree with this interpretation and already announced that the judgment will be appealed on this point of law before the Spanish Supreme Court. See pp. 630-632 and 720-721 of the judgment. It can be downloaded from <http://mas.lne.es/documentos/archivos/31-10-07-SENTENCIA.pdf>

⁴³ http://ec.europa.eu/justice_home/news/consulting_public/conflicts_jurisdiction/news_contributions_conflicts_jurisdiction_en.htm

⁴⁴ See SEC(2007) 896 of 3.7.2007, pp. 36-37.

⁴⁵ The proposal was submitted by the Commission on 4 October 2005. COM(2005) 475 final and SEC (2005) 1241.

⁴⁶ See Council doc. 11365/1/07 REV 1 of 21 September 2007.

⁴⁷ Council doc. 12604/07, p. 21.

consent, are met. At the Council meeting of 8-9 November 2007, a general approach on the proposal was reached⁴⁸.

The European Parliament delivered a first opinion on 27 September 2006⁴⁹ and another one on 7 June 2007⁵⁰ on the revised draft of the FD. The Parliament approved in both cases the draft FD, subject to a number of amendments.

Co-operation

3.2.6. Exchange of information extracted from criminal records between Member States

The main aim of the establishment of criminal records is to inform the authorities responsible for the criminal justice system of the background of a person subject to legal proceedings with a view to adapting the decision to be taken regarding the individual situation⁵¹.

Information on convictions is currently exchanged between Member States through systems set up by Articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters of 1959⁵². These systems suffer from certain shortcomings with the result that national courts often pass sentences on the sole basis of the past convictions featuring in their national register, with no knowledge of other convictions in other Member States⁵³.

The Decision on the exchange of information extracted from the criminal record, adopted by the Council on 21 November 2005, aims at facilitating and speeding up the transmission of information held in the Member States' national criminal records via a designated Central Authority⁵⁴. This Decision, however, does not make any fundamental changes to the above-mentioned Council of Europe Convention and does not address issues concerning the organisation and content of the information exchanged. The information is forwarded using the Form provided in the Annex to the Council Decision.

At present, it is under discussion the Manual of Procedure, intended to assist practitioners in making requests for information⁵⁵.

On 22 December 2005 the Commission submitted a proposal for a Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States⁵⁶. The aim of this proposal is a thorough reform of the systems mentioned above, with a view to ensuring that the Member States of the person's nationality is able to respond properly and fully to the requests made to it. It is intended to apply to requests in the framework of criminal and non-criminal proceedings and also addresses the issue of

⁴⁸ Council doc. 14617/07, p. 9. Denmark, Ireland, Sweden and the UK have entered a parliamentary scrutiny reservation.

⁴⁹ P6_TA(2006)0370.

⁵⁰ P6_TA-PROV(2007)0230.

⁵¹ See Council of Europe Recommendation N° R (84) 10 on criminal records and rehabilitation of convicted persons.

⁵² Council of Europe, European Treaties Series, N° 30.

⁵³ The mentioned shortcomings were analysed by the Commission in the "White Paper on exchanges of information on convictions and the effect of such convictions in the European Union". COM(2005) 10 final of 25.1.2005 and SEC(2005) 63 of 25.1.2005 (Annex to the White Paper).

⁵⁴ OJ L 322/33 of 9.12.2005. The EP delivered its opinion on 22 February 2005, OJ C 304 E/107 of 1.12.2005.

⁵⁵ See Council document 11060/1/07 REV 1.

⁵⁶ COM(2005) 690 final of 22.12.2005.

information exchange arising from convictions for sexual offences committed against children. The Council agreed on a general approach to the proposal at the Justice and Home Affairs meeting of 12-13 June 2007⁵⁷. The European Parliament delivered its opinion on 21 June 2007⁵⁸ and proposed a number of amendments to the proposal.

In order to further improve access to information on criminal convictions, the Commission presented a Working Document on the **feasibility of an index of third-country nationals convicted in the European Union** on 4 July 2006⁵⁹. The legislative proposal has been delayed and is expected during the 1st quarter of 2008.

3.2.7. Convictions in the course of new criminal proceedings

On 17 March 2005 the Commission submitted a proposal for a Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings⁶⁰. In accordance with this instrument:

- Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States are taken into account.
- Information on convictions could be obtained under applicable instruments on mutual legal assistance or through the exchange of information extracted from criminal records.
- Previous convictions are taken into account to the extent that previous national convictions are taken into account, and equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.

The European Parliament delivered its opinion on 27 September 2006⁶¹ and the Council reached a general approach at the Justice and Home Affairs meeting of 4-5 December 2006⁶². The text will be adopted when all the parliamentary scrutiny reservations are lifted. Following its entry into force, Member States will have two years to comply with its provisions.

3.2.8. The European supervision order (ESO) in pre-trial procedures

On 29 August 2006 the Commission presented a proposal for a Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union⁶³. The ESO enables persons upon which a non-custodial supervision measure has been imposed at the pre-trial phase in criminal proceedings (in a Member State where they are not normally resident) to be subject to control and supervision in the Member State where they are normally resident. That Member State will be then responsible for supervising the measure imposed upon the suspect and will be required to report any breach thereof to the issuing State in which criminal proceedings are pending.

⁵⁷ See Council document n° 10267/07, p. 30.

⁵⁸ See P6_TA-PROV(2007)0279.

⁵⁹ COM(2006) 359 final of 4.7.2006.

⁶⁰ COM(2005) 91 final of 17.03.2005.

⁶¹ See P6_TA(2006)0373.

⁶² See Council document n° 15801/06, p. 29.

⁶³ COM(2006) 468 final of 29.8.2006.

The Presidency of the Council considered it was appropriate to first hold a policy debate in the Council on the Commission proposal, taking into account that although all Member States support the objectives of the proposal, many have doubts concerning its drafting.

The Presidency revise the text of the proposal in consultation with the Commission services on the basis of the principles approved by the Council at the Justice and Home Affairs meeting that took place on 18 September 2006⁶⁴:

- The ESO should be based on the principle of mutual recognition.
- Specific features of the national systems of criminal justice as regards the criteria and conditions for issuing a ESO should be respected as far as possible.
- Coherence should be ensured with the approach taken in other instruments of mutual recognition, in particular the FD on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences (FD on “probation”).

A draft report on the Commission proposal was presented on 25 September 2007 to the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament⁶⁵.

3.2.9. Recognition of suspended sentences, alternative sanctions and conditional sentences

In January 2007 Germany and France presented an initiative with a view to adopting a Council Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences⁶⁶, also known as the FD on “probation”.

This initiative is closely linked with the European supervision order applied during the pre-trial phase. The FD on “probation” concerns the post-trial phase laying down the rules according to which one Member State supervises suspensory measures imposed on the basis of a judgment which was issued in another Member State, or alternative sanctions contained in such a judgment and takes all other decisions relating to the execution of that judgment, insofar as this falls within its competence.

The Portuguese Presidency is confident that it should be possible to reach tangible results on this draft Framework Decision during its term in office⁶⁷.

The European Parliament delivered its opinion on 25 October 2007 and proposed a number of amendments to the proposal⁶⁸.

3.2.10. Transfer of sentenced persons to another Member State

At the Justice and Home Affairs meeting of 15 February 2007⁶⁹, the Council agreed on a general approach concerning the Framework Decision on the application of the principle of mu-

⁶⁴ Council document n° 12604/07, pp. 16-17.

⁶⁵ See EP document 2006/0158(CNS). Rapporteur: Ioannis VARVITSIOTIS.

⁶⁶ OJ C147/1 of 30.6.2007.

⁶⁷ See Council document 12495/07. At the meeting of 8-9 November 2007, the JHA Council reached a common understanding on three issues of the draft FD. See 14617/07, pp. 16-17.

⁶⁸ See EP document P6_TA-PROV(2007)0475.

⁶⁹ Council document n° 5922/07.

tual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU⁷⁰.

This legal instrument goes further than the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983. Under the latter, sentenced persons may be transferred to serve the remainder of their sentences only to their State of nationality, and only with their consent and that of the states involved⁷¹.

The Framework Decision will allow the transfer of sentenced persons to another Member State for the purpose of enforcement of the sentence imposed enhancing, therefore, the possibility of social rehabilitation of the sentenced person. His or her involvement in the proceedings will no longer be dominant by requiring in all cases his or her consent to the forwarding of a judgment to another Member State for the purpose of its recognition and enforcement of the sentence imposed.

The European Parliament delivered its opinion on the proposal on 14 June 2006⁷². In the light of the changes made to the original texts during the negotiations, the Council decided to re-consult the EP which delivered its second opinion on 25 October 2007, approving the Council draft⁷³.

Finally, it should be noted that several Member States have introduced parliamentary scrutiny reservations⁷⁴.

3.2.11. The European Evidence Warrant (EEW) and the horizontal approach in relation to certain categories of offence

A proposal for a Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters was submitted by the European Commission on 14 November 2003⁷⁵.

The EEW will be an order issued by a judicial authority in one Member State and directly recognised and enforced by a judicial authority in another Member State to facilitate the obtaining of evidence in cross-border cases. It will cover objects, documents and data needed in the issuing State for the purpose of criminal proceedings or other proceedings that might give rise to further proceedings before a criminal court.

The European Parliament delivered its opinion on the proposal on 31 March 2004⁷⁶, approving it and proposing a number of amendments. The JHA Council adopted a general approach on the proposal at its meeting held in Luxembourg on 1-2 June 2006⁷⁷.

⁷⁰ The initiative was submitted by Austria, Finland and Sweden on 24 January 2005. Its original title was “Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union”. OJ C 150/1 of 21.6.2005.

⁷¹ The Additional Protocol to the Convention of 18 December 1997 allows transfer without the person’s consent, subject to certain conditions. It has not been ratified yet by all the Member States.

⁷² See EP document P6_TA(2006)0256.

⁷³ See EP document P6_TA-PROV(2007)0476.

⁷⁴ Denmark, Ireland, The Netherlands and Sweden. See Council document 10853/07 of 18.6.2007.

⁷⁵ See COM(2003) 688 final of 14.11.2003.

⁷⁶ EP doc. P5_TA(2004)0243.

⁷⁷ Council doc. 9409/06, p. 9.

Due to the fact that two Member States, Denmark and Sweden, have introduced parliamentary scrutiny reservations, the final text will not be adopted by the Council until they have been lifted⁷⁸.

The **Green Paper on handling of evidence** that the Commission was due to present in 2006 has been delayed⁷⁹.

Related to the Framework Decision on the EEW and, more generally, with legal instruments based on the principle of mutual recognition, is the discussion on the horizontal approach in relation to certain categories of offence, in particular, terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion, and swindling. The JHA Council took note of the state of play of work undertaken in this area at its meeting of 12-13 June 2007⁸⁰.

The Council explains that the horizontal approach stems from the wish of a Member State which argued that those categories of offence might differ greatly in substance and in coverage from one legal system to another. In the view of that Member State, a common understanding by Member States of the substance of the six categories mentioned could eliminate the scope for differing interpretations.

Member States, in general, took a positive view of work in this area, but some delegations argued that defining the mentioned offences more precisely could mean a step backwards in mutual recognition, which involves the abolition of double criminality in certain categories of offences.

The Council, in any case, concludes that **this initiative will have to wait until more experience is gained on legal instruments based on mutual recognition**, like the European Arrest Warrant or the European Evidence Warrant, and the possible problems in putting them into practice are detected.

3.2.12. E-Justice

At the meeting of 12-13 June 2007, the JHA Council adopted the Conclusions on E-Justice⁸¹. The Council agrees, according to recital 2 of the conclusions, that work should carry on in this area with a view to creating at a European level a technical platform giving access, in the sphere of justice, to existing or future electronic systems at national, Community and, where appropriate, international level⁸².

According to recital 6 of the conclusions, the E-Justice system should be limited to cross-border issues in civil and commercial matters and in criminal matters and should cover:

- The set-up of a European interface (E-Justice portal).
- The possible use of IT for communications between the judicial authorities and interested parties (applicant, defendant and other participants involved in the proceedings).
- The possible use of IT in the context of specific procedures.

⁷⁸ See Council doc. 10511/07 of 11.6.2007.

⁷⁹ See SEC(2007) 896 of 3.7.2007, p. 37.

⁸⁰ See Council doc. 10267/07, pp. 38-40.

⁸¹ See Council doc. 10509/07 of 7.6.2007 and 10267/07 of 12/13.6.2007, pp. 43-45.

⁸² The report by the Council Working Party on Legal Data Processing (E-Justice) is available under Council doc. 10393/07 of 5.6.2007.

- Access to judicial registers in electronic form, in the full respect of the legal orders of the Member States.

Discussions continued at the informal meeting of JHA Ministers in Lisbon on 1-2 October 2007, since E-Justice is one of the main priorities of the Portuguese Presidency in the area of justice.

The Working Party on Legal Data Processing (E-Justice) will submit a report to Coreper, to be subsequently submitted to the Council in December 2007 on progress made in the area of E-Justice, listing in particular, the existing projects in this area⁸³.

3.3. Other developments

This section provides a synthesis of other developments, such as the current state of play of the European Arrest Warrant, Eurojust and the European Judicial Network in criminal matters, and finally, mentioned briefly, the involvement of the EU in the activities of the Council of Europe and the United Nations in the fields of mutual legal assistance and corruption.

3.3.1. The European Arrest Warrant (EAW)

The **second report from the Commission on the implementation of the European Arrest Warrant and the surrender procedures between Member States**⁸⁴ was adopted on 11 July 2007⁸⁵. The Commission confirms that its implementation has been a success, despite constitutional difficulties in at least two Member States (Germany during part of 2005 and 2006, and Cyprus) and the need for certain improvements in transposition in a number of Member States.

A **mutual evaluation exercise** (peer review) concerning the application of the European arrest warrant is also being held in the Member States⁸⁶.

The European Court of Justice confirmed the validity of the FD on the European arrest warrant in the judgment delivered on 3 May 2007⁸⁷. Asked by a national court if the removal of verification of double criminality, for certain offences mentioned in the FD, is contrary to the principle of legality in criminal matters, the ECJ responded that it is not due to the fact that the definition of those offences and penalties continues to be determined by the law of the issuing Member State which must respect fundamental rights, including the principle of legality of criminal offences (*nullum crimen, nulla poena sine lege*).⁸⁸

With respect to the fact that the lack of precision in the definition of the 32 categories of offences listed in the FD risks giving rise to inconsistent implementation of the FD within the various national legal orders, the Court just pointed out that it is not the objective of the FD to harmonise the substantive criminal law of the Member States. It is concluded that the principles of equality and non-discrimination are also respected by the European Arrest Warrant⁸⁹.

⁸³ See Council doc. 12046/1/07 REV 1 of 24.7.2007.

⁸⁴ OJ L 190/1 of 18.7.2002.

⁸⁵ See COM(2007) 407 final of 11.7.2007.

⁸⁶ See, for example, the report on Portugal: Council doc. 7593/2/07 REV 2.

⁸⁷ Case C-303/05.

⁸⁸ See recitals 52-53 of the judgment.

⁸⁹ See recital 59 of the judgment.

3.3.2. The development of Eurojust and the European Judicial Network in criminal matters

The European Commission submitted on 23 October 2007 a Communication on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the EU⁹⁰. It is considered that the development of Eurojust needs to be accompanied by a clarification and reinforcement of the powers of the national members and by greater authority for the College. In order to achieve this objective, the Eurojust Decision will need to be amended.

The Commission incorporates to this Communication an Annex on the transposition of the current Eurojust Decision. Work remains to be done by different Member States in order to fully transpose the Decision into their national legislations. In any case, Eurojust stresses that its operational record is a positive one; in 2006, 771 operational cases were registered⁹¹.

Eurojust submitted its 5th Annual Report to the Council on 15 March 2007. The JHA Council adopted its conclusions on that report on 12-13 June 2007⁹².

With respect to the European Judicial Network (EJN), the JHA Council adopted the conclusions on guidelines for further work concerning the EJN at the meeting that took place in Luxembourg on 19-20 April 2007⁹³.

In the Communication of 23 October 2007, the Commission stresses that the EJN has proved a useful tool facilitating judicial co-operation between the Member States. Its Internet site on the systems of justice in Europe deserves special mention. However, the Commission considers that “the differences in the organisation of the network in different Member States, linguistic difficulties, legal difficulties in international co-operation and frequent overlaps with the field of responsibility of Eurojust all justify a reorganisation of the network”⁹⁴. The Commission describes, in that Communication, a new structure in order to strengthen and improve co-operation between Eurojust and the EJN⁹⁵.

3.3.3. The EU external relations in the field of judicial co-operation in criminal matters

Commission and Council officials regularly attend meetings on activities in criminal matters organised by the Council of Europe and other international organisations, like the United Nations⁹⁶.

The Commission proposal for a Council Decision concerning the signing, on behalf of the European Community, of Council of Europe Convention n° 198 on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism⁹⁷, has been delayed due to disagreement between Member States in the Council.

⁹⁰ COM(2007) 644 final.

⁹¹ This represents an increase of 31% over the year 2005. See COM(2007) 664 final, p. 2.

⁹² Council doc. 10267/07, p. 58. See also 9920/07.

⁹³ Council doc. 8364/07, pp. 31-35.

⁹⁴ COM(2007) 644 final, p. 7.

⁹⁵ The national contact point referred to in the Joint Action of 29 June 1998 on the creation of the EJN, would also be the national correspondent of the Eurojust national member.

⁹⁶ See SEC(2007) 896 of 3.7.2007, pp. 38-39.

⁹⁷ COM(2005) 426 final of 13.09.2005.

The Commission proposal for a Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention against corruption was adopted on 2 March 2006⁹⁸. The Council agreed on a common position at the JHA Council of 4-5 December 2006⁹⁹.

The Council adopted decisions approving the conclusion of two protocols supplementing the UN Convention against Transnational Organised Crime to fight against the smuggling of migrants by land, sea and air, and to prevent, suppress and punish trafficking in persons, especially women and children at the JHA Council meeting of 24 July 2006¹⁰⁰.

The European Union also co-operates with third countries in the field of judicial co-operation in criminal matters. With respect to extradition and mutual legal assistance issues, the Council reached an agreement on the surrender procedure between the Member States of the EU and Iceland and Norway on 27 and 28 April 2006¹⁰¹, based on Articles 24 and 38 EU.

With respect to the ratification of EU-US Agreements of 25 June 2003¹⁰² on extradition and mutual legal assistance, proceedings are not finalised yet¹⁰³.

4. CONCLUSIONS

We share the view of the European Commission on the difficulties that the current legal and institutional system established by the Third Pillar creates. The state of play of the different legislative proposals in the field of judicial co-operation in criminal matters shows that the Third Pillar mechanism does not always contribute to an effective and efficient decision making process.

The amendments set out in the Draft Reform Treaty that would transfer police and judicial co-operation in criminal matters into Title IV TFEU are relatively encouraging. Although the European Parliament would obtain more powers in the legislative process and this would improve democratic legitimacy of legal acts, the lack of direct effect of Third Pillar measures adopted before the entry into force of the new treaty, the partial shift to qualified majority voting, the jurisdictional control subject to a transitional period of five years for those measures adopted before the entry into force of the new treaty, the extension of the UK, Irish and Danish opt-outs to the entire new Title IV TFEU, and the inapplicability of the infringement procedure during a period of five years from the entry into force of the new treaty for measures adopted before the entry into force of the new treaty, will surely prevent the EU from making progress in the European criminal law area at a faster pace.

While not always desirable, the use of enhanced co-operation could be a possibility for those Member States that wish to go faster than the others, especially in those areas where unanimity is required, i.e. for the establishment of the European Public Prosecutor's Office from Eurojust.

⁹⁸ COM(2006) 82 final.

⁹⁹ Council doc. 15801/06, p. 34.

¹⁰⁰ Council doc. 11556/06, p. 16 and 11384/06 of 14 July 2006.

¹⁰¹ OJ L 292/1 of 21.10.2006 and L 292/2 of 21.10.2006.

¹⁰² OJ L 181/25,27,34 of 19.7.2003.

¹⁰³ Council doc. 5916/1/07 REV 1.